Ahmad Zaini bin Zainol & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL NOS P-05–357 OF 2009 AND P-05–358 OF 2009
ABDUL MALIK ISHAK, AZHAR MA'AH AND APANDI ALI JJCA
24 SEPTEMBER 2012

Criminal Law — Possession of firearms — Proof of physical possession of firearms — Discovery of large quantities of firearms in house rented and occupied by appellants — Appellants convicted and sentenced to death — Appeal against conviction and sentence — Whether trial judge erred in findings — Whether presumption of trafficking in firearms rebutted — Whether trial judge exercised proper discretion in imposing death penalty against appellants

Criminal Procedure — Appeal — Fact, finding of — Interference by appellate court — Whether warranted

Evidence — Character of accused — Conduct — Attempt to flee scene of crime — Whether signifies guilt

Evidence — Witnesses — Credibility of — Contradicting statements by prosecution witness — Impeachment proceedings carried out — Whether impeachment proceedings conducted in proper manner by trial judge — Whether trial judge erred when he reserved his decision on impeachment proceeding until end of prosecution case

When a police party headed by DSP Foo Chee Lip had conducted a raid of a double-storey terrace house situated in Seberang Perai Selatan ('the house'), they discovered numerous firearms and ammunition in various places in the house that was rented and occupied by both the appellants. One firearm, a Browning pistol complete with a silencer, was found in a brief case containing the first appellant's personal effects and the rest of the firearms were found in a locked motorcar ('the car') that was parked in the porch of the house. The car was under the control of the first appellant. At the time when the police team gained entry into the house the appellants and one Norlila bt Ismail (PW21), were in the house. However, the appellants had escaped through a hole in the ceiling and were eventually flushed out of their hiding place more than 12 hours later by the police resorting to the use of tear gas. The appellants were charged with the unlawful possession of the firearms, an offence under the

Firearms (Increased Penalties) Act 1971 ('the Act'). At the end of the trial, both appellants were found guilty and sentenced to death. This was the appellants' appeal against that conviction and sentence. The appellants submitted that the trial judge ought to have accepted PW21's narration of events and that the impeachment proceedings against PW21 were not properly conducted. The appellants further submitted that the trial judge had not considered the possible involvement of another person, who had access to the house. The appellants contended that they had run from the house because they feared that robbers had entered.

Held, dismissing the appeal:

(1) The impeachment proceedings were conducted in a proper manner by the trial judge. The witness, PW21, had been given ample opportunity and time to explain the material contradictions between what she said under oath in court and the written statement she gave the police. The trial judge, who heard the evidence of PW21 and the recording officer, was the best person to make a decision on the impeachment application. As such, there was no reason to disturb the exercise of the discretion by the trial judge. Further, the trial judge was not in error when he reserved his decision on the impeachment application and proceeding until the end of the prosecution case (see paras 7–8).

(2) The grounds of judgment showed that the trial judge had considered the possible involvement of another person, who had access to the house. In any case, this issue involves a finding of fact and the appellate court would be slow to disturb such a finding unless it was against the weight of available evidence (see para 8).

(3) The appellants' contentions that there was no evidence of their trafficking in the firearms and that their act of running away was justified had no merit. The appellants were found to be in unlawful possession of twenty six firearms, which is thirteen times more than the number required to trigger the presumption under s 7(2) of the Act. The presence of such a large quantity of firearms and ammunition and the manner they were found in the house and in the car, without any plausible explanation from the appellants, gave rise to a strong inference that both of them had knowledge of the subject matter of the charges against them. This incontrovertible evidence had to be evaluated with the other incontrovertible evidence of the actual positive actions undertaken by the appellants to escape apprehension and arrest. The appellants' explanation that they escaped because they thought robbers had entered the house could not hold water as no jewellery or substantial cash was found in the house (see paras 12, 13, 18 & 19).

(4) The appellants' unsworn statements were more consistent with a concocted story. With no evidence forthcoming from the appellants

during their defence, it was inevitable that the presumption of trafficking in firearms under s 7(2) of the Act remained unrebutted. In the circumstances, the trial judge had exercised his proper discretion in imposing the death penalty against the appellants. There was no reason for appellate interference (see paras 20 & 25).

[Bahasa Malaysia summary

Apabila sepasukan polis yang diketuai oleh DSP Foo Chee Lip menjalankan satu serbuan di sebuah rumah teres dua tingkat yang terletak di Seberang Perai Selatan ('rumah tersebut'), mereka telah menemui sebilangan senjata api dan peluru di pelbagai tempat di dalam rumah yang disewa dan dihuni oleh kedua-dua tertuduh. Salah satu senjata api, pistol Browning lengkap dengan silencer, telah ditemui di dalam beg bimbit yang mengandungi barangan peribadi perayu pertama dan senjata-senjata api yang selebihnya telah ditemui di dalam sebuah kereta yang terkunci ('kereta') yang diletakkan di anjung rumah. Kereta tersebut berada di bawah kawalan perayu pertama. Apabila pihak polis berjaya masuk ke dalam rumah, perayu-perayu dan Norlila bt Ismail ('PW21'), berada di dalam rumah. Walau bagaimanapun, perayu-perayu telah melarikan diri melalui satu lubang pada siling dan akhirnya keluar dari tempat persembunyian mereka lebih daripada 12 jam kemudian apabila pihak polis menggunakan gas pemedih mata. Perayu-perayu telah dituduh memiliki senjata api secara haram, suatu kesalahan di bawah Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta'). Di akhir perbicaraan, kedua-dua perayu didapati bersalah dan dijatuhkan hukuman mati. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman. Perayu-perayu menghujahkan bahawa hakim bicara sepatutnya menerima rentetan PW21 mengenai kejadian tersebut dan bahawa prosiding pencabaran terhadap PW21 tidak dijalankan dengan betul. Perayu-perayu seterusnya menghujahkan bahawa hakim bicara gagal mempertimbangkan kemungkinan penglibatan orang lain, yang mempunyai akses ke rumah tersebut. Perayu-perayu menghujahkan bahawa mereka telah melarikan diri dari rumah kerana khuatir rumah dimasuki perompak.

Diputuskan, menolak rayuan:

(1) Prosiding pencabaran telah dijalankan oleh hakim bicara dengan cara yang betul. Saksi tersebut, PW21, telah diberi peluang dan masa yang secukupnya untuk menjelaskan percanggahan ketara antara apa yang dikatakannya di bawah sumpah di mahkamah dan pernyataan bertulis yang diberikannya kepada pihak polis. Hakim bicara yang mendengar keterangan PW21 dan pegawai rakaman, adalah pihak yang paling layak untuk memutuskan tentang permohonan pencabaran tersebut. Oleh itu, tiada sebab untuk mengganggu penggunaan kuasa budi bicara hakim bicara. Selanjutnya, hakim bicara tidak khilaf dalam mengetepikan

keputusannya berkenaan permohonan pencabaran dan prosiding hinggalah ke akhir kes pendakwaan (lihat perenggan 7–8).

(2) Alasan penghakiman menunjukkan bahawa hakim bicara telah mempertimbangkan kemungkinan penglibatan orang lain, yang mempunyai akses ke rumah. Dalam apa jua kes, isu ini melibatkan dapatan fakta dan mahkamah rayuan adalah perlahan untuk campur tangan dengan dapatan sedemikian melainkan jika ia bertentangan dengan beban bukti yang ada (lihat perenggan 8).

(3) Hujahan perayu-perayu mengenai ketiadaan bukti pengedaran senjata api dan perbuatan mereka melarikan diri adalah wajar tidak bermerit. Perayu-perayu telah didapati, mempunyai dalam milikan mereka secara salah, dua puluh enam senjata api, iaitu tiga belas kali lebih daripada bilangan yang diperlukan untuk membangkitkan anggapan di bawah s 7(2) Akta tersebut. Kewujudan senjata api dan peluru dalam kuantiti yang besar dan cara mereka ditemui di rumah dan di dalam kereta, tanpa sebarang penjelasan munasabah daripada perayu-perayu, menimbulkan kesimpulan yang kukuh bahawa kedua-dua mereka mempunyai pengetahuan tentang hal perkara tuduhan terhadap mereka. Bukti yang tidak dipertikaikan ini harus dinilai dengan bukti yang tidak dipertikaikan lain bagi tindakan positif yang sebenarnya dijalankan oleh perayu-perayu untuk mengelakkan penahanan dan penangkapan. Penjelasan perayu bahawa mereka melarikan diri kerana memikirkan bahawa perompak telah memasuki rumah tersebut tidak boleh dipercayai kerana tiada wang tunai atau barang kemas yang banyak telah ditemui di dalam rumah (lihat perenggan 12, 13, 18 & 19).

(4) Kenyataan tidak bersumpah oleh perayu-perayu adalah lebih konsisten dengan cerita palsu. Tanpa keterangan oleh perayu semasa pembelaan mereka, tidak dapat dielakkan bahawa anggapan mengedar senjata api di bawah s 7(2) Akta kekal tidak disangkal. Dalam keadaan ini, hakim bicara telah menjalankan budi bicara yang sepatutnya dalam menjatuhkan hukuman mati terhadap perayu-perayu. Tidak ada sebab untuk campur tangan terhadap rayuan (lihat perenggan 20 & 25).]

Notes

For a case on conduct, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 757.

For a case on proof of physical possession of fireams, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3233.

For cases on credibility of, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

For cases on fact finding of, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 478–567.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Loganatha Venkatesan & Ors v PP [2000] 3 SLR 677, CA (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (folld)
PP v Abdul Rahman Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (folld)
PP v Sanassi [1970] 2 MLJ 198 (refd)

Legislation referred to

Arms Act 1960 s 4
Evidence Act 1950 ss 8, 9
Firearms (Increased Penalties) Act 1971 ss 2, 7(1), (2)

Appeal from: Criminal Trial No 45–25 of 2001 (High Court, Pulau Pinang)

Ranjit Singh Dhillon (J Kaur, Ranjit & Associates) for the first appellant.
Kitson Foong (Ahmad Zaidi & Partners) for the second appellant.
Yusaini Amer bin Abd Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali (delivering judgment of the court):

INTRODUCTION

[1] At the High Court in Penang, both the appellants were convicted and sentenced for two offences, of which the charges read as follows:

> (1) Bahawa kamu bersama-sama pada 11hb Januari 2001, jam lebih kurang 1.15 pagi, di sebuah rumah No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Ampat, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang telah didapati berdagang senjata api seperti berikut:
>
> 1. Sepucuk pistol jenis SIG SAUER P228, No. B112353 bersama (2) magazine.
> 2. Sepucuk pistol BROWNING FN No. 123142 di pasang silencer serta (1) magazine.
> 3. Selaras pump gun sejenis Remington buatan USA.
> 4. Selaras SMG tidak bernombor serta (2) magazine.
> 5. Sepucuk pistol Browning BDM No. 945 NW 02234 buatan USA bersama (1) magazine.
> 6. Selaras shot gun pumpaction jenama Mossberg buatan USA No. J.606008.

7. (20) butir bom tangan.

Oleh yang demikian kamu adalah telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 7 (1) Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37).

and (2)

Bahawa kamu bersama-sama pada 11hb Januari 2001, jam lebih kurang 1.15 pagi, di sebuah rumah No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Ampat, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang, telah didapati dalam milik kamu amunisi seperti berikut:-

1. (11) butir peluru jenis 9 mm.
2. (6) butir peluru jenis 7.65 mm.
3. Sekotak kertas bertulis 'Full metal Jacket 71 gr' berisi (17) butir peluru jenis 7.65 mm.
4. Sekotak kertas bertulis 'full Metal Jacket 124 gr' berisi (43) butir peluru jenis 9 mm.
5. (2) buah kotak bertulis 45 Automatic 230 gr 'full Metal Jacket' berisi sejumlah (95) butir peluru jenis 45.
6. Sekotak kertas bertulis Winchester 25 Auto 50 gr berisi (5) butir peluru jenis 25 mm.
7. (15) butir peluru jenis 9 mm.
8. Sekotak kertas bertulis Mat Jan Shotgun Cartridges berisi (14) butir peluru jenis 70 mm (12 bore).
9. Sebuah beg plastik hitam berisi (13) butir peluru jenis 70 mm (12 bore).
10. (14) butir peluru jenis 9 mm.
11. (5) buah kotak bertulis 99 mm para Full Metal Jacket berisi sejumlah (250) butir peluru jenis 9 mm.

Tanpa lesen yang dikeluarkan kepada kamu di bawah kehendak-kehendak Seksyen 4 Akta Senjata No. 21 Tahun 1960 dan boleh dihukum di bawah Seksyen 8(a) Akta yang sama.

[2] At the end of the trial both the appellants were found guilty and convicted and were sentenced to death for the offence under s 7(1) of the Firearms (Increased Penalties) Act 1971 and sentenced to six years imprisonment with effect from the date of their arrests, in respect of the offence under s 4 of the Arms Act 1960.

[3] The appellants appealed to this court against both their convictions and sentences. After hearing the appeals, we dismissed them. We shall now give our reasons.

A FACTUAL BACKGROUND OF THE CASE

[4] During the appeal, learned counsel for both the appellants did not raise any complaint about the facts of the case as described by the learned trial judge in his grounds of judgment. As such, we shall reproduce the facts of the case as so written by the learned trial judge, which reads as follows:

> 11. The gist of the prosecution case is that on 11.1.2001 at about 1.15 am, DSP Foo Chee Lip SP12 led a team on a raid at a premises No. 3, Lorong Idaman 2/2, Taman Idaman Simpang Ampat, Seberang Perai Selatan ('the House'). At the time of the raid the 2 accused and SP21 were in the House. When the police team managed to cut the front grill and gain entry to the House, the 2 accused ran upstairs and escaped up a ladder into a hole in the ceiling. They were later arrested hiding near a water tank above the ceiling of house No. 19, Lorong Idaman 2/2 at 1.15 pm on 11.1.2001. Earlier SP21 had been arrested in the House by the raiding party as soon as they entered the House. In the House and in a locked Suzuki Vitara parked in the porch the Police raiding party found the arms and ammunition as per the Amended Charge and the Amended Second Charge.
>
> 12. SP5, ASP Zuki bin Othman, the Pegawai Turus Logistik Persenjataan, IPK Pulau Pinang, the Prosecution's Expert Witness in regard to the firearms and ammunition testified that he examined the 20 hand grenades that were in the locked Suzuki Vitara (P32) and found 11 to be model M61 and 9 to be model M67. He also found them to be 'live' and complete with a lever, body fragmentation and safety pin. On 17.6.2004 he destroyed the 20 hand grenades by exploding them at Quary Weng Lee, Berapit, Bukit Mertajam. SP5 also examined the weapons and ammunition seized and found the weapons to be serviceable and the ammunition to be usable as he was able to test fire samples of the ammunition.
>
> 13. Lee Ah Bah (SP8) testified that he was the owner of house No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Empat, Seberang Perai Selatan. In the middle of July 2000 SP8 rented the house to the 1st accused for RM480 per month. The tenancy agreement dated 20.7.2000 was marked P24.

CONTENTIONS BY THE APPELLANTS

[5] In this appeal, although each of the appellants was represented by a different counsel, their contentions were common to each other. As such, we shall deal with all the contentions together.

[6] We must note that in this appeal the core issue is the possession of the subject matter of the charges, ie of the various firearms, hand grenades and various caliber of ammunition, by both the appellants. However, the

contentions canvassed by learned counsel for each of the appellants can be categorised as follows:

(a) the impeachment proceedings against PW21, Norlila bt Ismail, who was earlier arrested at the house, was not properly conducted and that possession could be attributed to her;

(b) corollary to contention (a), it was also submitted that the story as narrated by PW21 ought to have been accepted by the trial judge;

(c) the existence of one Farok Khan was not properly considered by the learned trial judge;

(d) that the reaction of both the appellants in running away was justified as they thought that the men who forcibly entered the house were robbers; and

(e) that there was no evidence of trafficking of the firearms.

OUR ANALYSIS AND FINDINGS

[7] On contentions No (a) and (b) above, it is our judgment that the impeachment proceedings by the learned trial judge was conducted in a proper manner. In the said proceedings as recorded in the notes of evidence, the witness PW21 was given ample opportunity and time to explain the material contradictions between what she said, under oath in court and the written statement she gave to the police.

[8] Having heard the evidence of PW21 and that of the recording officer, it is well within the discretion of the learned judge to make a decision on the impeachment application. The learned trial judge was in the best position to do so. He had the advantage of hearing and to observe the manner and the body language of the witnesses who gave evidence during the impeachment proceedings. We see no reason to disturb the exercise of discretion by the learned trial judge. The learned trial judge was also not in error when he reserved his decision on the impeachment application and proceeding, until the end of the case for the prosecution. The approach adopted by the learned trial judge was in line with the reasoning in Singapore Court of Appeal case of: *Loganatha Venkatesan & Ors v Public Prosecutor* [2000] 3 SLR 677, which held that:

> ln our opinion, there is no requirement that the trial judge must, at any stage of the trial, make a ruling on whether the credit of the witness is impeached. All that is required is that the court must consider the discrepancies and the explanation proffered by the witness for the purpose of an overall assessment of his credibility. In this regard, it is important to bear in mind that an impeachment of the witness's

A credit does not automatically lead to a total rejection of his evidence. The court must carefully scrutinise the whole of the evidence to determine which aspect might be true and which aspect should be disregarded: see *Public Prosecutor v Somwang Phatthanasaeng* [1992] 1 SLR 138 (HC) and *Kwang Boon Keong Peter*. Thus, regardless of whether his credit is impeached, the duty of the court remains, that is, to evaluate the evidence in its entirety to determine which aspect to believe. Reverting to the present case, the learned judge was clearly correct when he said that he took into consideration the two discrepancies in deciding whether to accept Julaiha's evidence. There was absolutely nothing wrong with this approach.

[9] We find no merit on contentions (a) and (b).

[10] On contention (c), we find that the learned trial judge had indeed considered the possible involvement of a person by the name of Farok Khan. The learned trial judge had adequately addressed this issue in para 20 of his grounds of judgment, which reads as follows:

20. The defence argued that another person ie Farok Khan had access to the House and so the 1 accused could not be said to be in exclusive possession. However this Farok Khan is since deceased. There is evidence that Farok Khan was neither arrested in regard to this case, nor was he arrested at the House where the first and second accused was arrested. He was arrested the next day at a different address and in regard to a different case. Even if Farok Khan had been to the House it did not mean that the 2 accused could not have been in possession of the arms and ammunition. There were firearms found in the briefcase which contained the personal documents of the first accused. SP12 saw the 2 accused and SP21 seated at a table at the centre of a House just before the staircase. The inference to be drawn by the two accused taking flight is that they were in possession of the arms and ammunition found in the House.

[11] This issue is a finding of fact. It is trite law that the appellate court is slow in disturbing such finding unless it is against the weight of available evidence (see *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281).

[12] On the last contention of no evidence of trafficking of the firearms, it is our judgment that once the unlawful possession of more than two firearms has been proven, the presumption of trafficking in firearms under s 7(2) of the Firearms (Increased Penalties) Act 1971 will be triggered. Section 7(2) of the Act reads as follows:

7(2) Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.

[13] In the present case, the appellants were found to be in unlawful

possession of seven firearms, including 20 hand grenades. 'Firearm' under s 2 of the Firearms (Increased Penalties) Act 1971, includes grenade containing an explosive charge. In other words, in this case, the appellants were found to be in unlawful possession of actually 26 firearms. It is 13 times more than the number required to trigger the presumption under s 7(2) of the Act!

[14] For the above reasons, we find that there is no merit in the appellants' last two contentions.

CONCLUSION

[15] Bearing in mind that an appeal is a continuation of the hearing of the charges against both the appellants, we evaluated all the evidence adduced at the trial.

[16] Since one of the prosecution witnesses, ie PW21 has turned hostile, we posed the question to ourselves as to whether without PW21's evidence was there sufficient evidence to support the findings and decision of the learned trial judge. We are of the opinion that there are sufficient other evidence.

[17] The incontrovertible evidence as found in the case are that the numerous firearms and ammunition were found in a house rented and occupied by both the appellants. One firearm, a Browning pistol complete with a silencer was found in a brief case containing the personal effects of the first appellant, Ahmad Zaini bin Zainol. The rest of the firearms were found in various places of the double-storey terrace house and also in a motorcar BEA 4673 which was under the control of the first appellant. The actual locations where the firearms and ammunition were found in the said house can be seen in the sketch-plan (exh P30). The list of firearms and ammunition seized are as listed in the search list (exh P33) and the police report (exh P34).

[18] Using the rationale, as to knowledge, in *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, we find that the presence of such a large quantity of firearms and ammunition, in the manner they were found in the house and in the motorcar, without any plausible explanation from the appellants, could naturally give rise to a strong inference that both of them had knowledge of the subject matter of the charges against them.

[19] This incontrovertible evidence, has to be evaluated with another incontrovertible evidence, ie that both of them were arrested on the ceiling of house No 19 in the same row of terrace houses. This house No 19 was eight houses away from the appellants' residence, at house No 3. The row of terrace houses were numbered in odd numbers, starting with Nos 1–27. The escape

route undertaken by the two appellants, via the ceiling of those houses, can be properly visualised by looking at the sketch plan (exh P40) and also the photographs (as can be seen from pp 388–395 of the appeal records). It is also an incontrovertible fact that both appellants tried to escape by climbing a wooden ladder on the upper floor of the house, to get onto the ceiling and moved along the ceiling of the various houses until house No 19. Both of them stayed on the ceiling, like mice on the run, for more than 12 hours, from just after midnight on 11 January 2001 until their arrest at about 1.30pm on the same day. The police had to seek the assistance of a specialised unit known as the *Unit Tindakan Khas* ('UTK') in order to apprehend the two appellants. The police had to resort to using tear-gas, to flush out the appellants from their hiding place. It is our judgment that this is not an attempt to flee but actual positive actions undertaken with such determination in order to escape apprehension and arrest. It is our considered view that such positive actions require an explanation of such conduct, under ss 8 and 9 of the Evidence Act 1950. The lame explanation that they tried to escape because they thought that the men who forcibly entered the house were robbers who wanted to rob them of their jewellery (*barang kemas*) and money could not hold water as no jewellery or substantial cash money was found in the house.

[20] During the defence stage, both the appellants opted to give (by reading a written statement each) unsworn statements from the dock. Such option is a substantive right of any accused person (see *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104). But it must be reminded that an unsworn statement from the dock cannot be the subject of cross-examination. As such, as Sharma J said in *Public Prosecutor v Sanassi* [1970] 2 MLJ 198: '… such a statement does not constitute evidence and the accused making such statement cannot be a witness'.

[21] In our case at hand, despite Justice Sharma's view that an unsworn statement from the dock is not evidence, the learned trial judge did nevertheless considered them for purposes of evaluation and re-evaluation of all the evidence at the end of the trial. This was a bonus for the appellants. The learned trial judge's consideration of the defence reads as follows:

> 37. Having considered the defence put forward by the first and second accused and their unsworn statements, I find that in its totality the defence raised by the 2 accused in (sic) (is) simply that of a mere denial of possession. They had attempted to implicate Farok Khan (deceased). To my mind they failed miserably. In so far as this defence is concerned I find that it raises no doubt as to the prosecution case, which is that the 2 accused were in possession of all the items mentioned in the two charges. I am satisfied that the 2 accused who were in their 'house clothes' in the House from which a vast quantity of serviceable arms and live ammunition were recovered were in fact and law in possession of those items when the Police party

raided the House. The accuseds' unsworn statements were to my mind a feeble attempt to tailor their defence knowing full well that they were not subject to cross-examination.

[22] It is our judgment that to be over cautious in considering the appellants' defence or explanation is not an error. After all, it does not in any way prejudice the appellants.

[23] To us, the two unsworn statements of the appellants (marked as exhs D60 and D61) were uncannily similar, not only in regard to the line of the story but also as to the actual words used in them. The unsworn statements were thus more consistent with a concocted story.

[24] Lastly, with no evidence forthcoming from the appellants during their defence, it is inevitable that the presumption of trafficking in firearms under s 7(2) of the Firearms (Increased Penalties) Act 1971 remained unrebutted.

[25] In view of the large quantity of firearms involved, especially when it involved a sub-machine gun and grenades, we are of the opinion that the learned trial judge had exercised his proper discretion in imposing the death penalty for the offence under s 7(1) of the Act. After all, as can be seen in the preamble of the Act, that was the legislative intention of the Firearms (Increased Penalties) Act 1971. Learned counsel did not submit on the sentences in respect of the offence under s 4 of the Arms Act 1960. Wherefore we are of the view, that the appellants were sentenced according to law and there is no reason for us to interfere with a discretion that was provided for by the law.

[26] For the above reasons, we unanimously dismissed the appeals by the appellants and accordingly affirmed the convictions and sentences by the High Court.

Appeals dismissed.

Reported by Kohila Nesan